FEB 27 1951
CHARLES ELMORE CROPLEY
CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 582

CHARLES D. REDWINE,
Revenue Commissioner of the State of Georgia,
Petitioner

VS.

DAN RIVER MILLS, INC.,
Respondent

Petition for Writ of Certiorari Directed to the Supreme Court of Georgia to Review a Decision of Said Court and Supporting Brief

---

EUGENE COOK,
Attorney General of Georgia
M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney General of Georgia
LAMAR W. SIZEMORE,
Assistant Attorney General of Georgia
MARTIN H. PEABODY,
of Counsel

INDEX

SUBJECT INDEX

	Page
Summary of Matter Involved	2
Statement of Basis of Jurisdiction	6
The Question Presented	6
Reasons Relied Upon for Sanctioning this Petition	7
Assignments of Error and Designation of Necessary Portions of the Record	8
Prayer	10
Appendix	11
Brief in Support of Petition for Certiorari	15

TABLE OF CITATIONS

Cases:

Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 254 U. S. 157	18
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62	18
General Trading Co. v. State Tax Commission, 322 U. S. 335	18
International Harvester v. Wisconsin Dept. of Taxation, 322 U. S. 435	17
International Shoe Co. v. State of Washington, 326 U. S. 310	17, 18
Johnson v. Risk, 137 U. S. 300	18
Klinger v. Missouri, 13 Wall. 257	18
Lawrence v. State Tax Commission, 286 U. S. 276	18
Maguire v. Taylor, 8 Wall. 650	18
Memphis Natural Gas Co. v. Stone, 335 U. S. 80	17
Nelson v. Montgomery Ward, 312 U. S. 373	18

Nelson v. Sears, Roebuck & Co., 312 U. S. 359 18
Nippert v. City of Richmond, 327 U. S. 416 18
Postal Telegraph Cable Co. v. Newport, 247 U. S. 464 .. 19
Shaffer v. Carter, 252 U. S. 37 17
Redwine, State Revenue Commissioner, v. Dan River Mills, Inc., 207 Ga. 378; 61 S. E. 2d 771 2
Suttles v. Owens-Illinois Glass Co., 206 Ga. 849; 59 S. E. 2d 392 ..... 5, 15, 16, 17
Tanza v. Susquehanna Coal Co., 220 N. Y. 259; 115 N. E. 915 18
Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 17
Ward v. Board of County Com'rs., 253 U. S. 17 19
Wheeling Steel Corp. v. Fox, 298 U. S. 193 ..... 16, 17
Williams v. Kaiser, 323 U. S. 471 ..... 16, 17

Constitutions:

Constitution of United States:
Art. I, Sec. 8, Par. 3 5
Amendment XIV 5, 16
Constitution of Georgia:
Art. I, Sec. 1, Par. 3 5

Statutes:

United States Statutes:
U. S. Code:
Title 28, Sec. 1257 (3) 6

Georgia Statutes:
Georgia Code of 1933 Annotated, Sec. 92-3113 .... 2, 6, 11

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. ------

CHARLES D. REDWINE,
Revenue Commissioner of the State of Georgia,
Petitioner

VS.

DAN RIVER MILLS, INC.,
Respondent

Petition for Writ of Certiorari Directed to the Supreme Court of Georgia to Review a Decision of Said Court

---

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Charles D. Redwine, as Revenue Commissioner of the State of Georgia, brings this petition in his official capacity for the writ of certiorari to be directed to the Supreme Court of the State of Georgia for the purpose of obtaining in this Honorable Court a review and, if conformable to law, a reversal of the decision of the Supreme Court of the State of Georgia, entered finally on the 15th day of November, 1950 (R. 49.) in the case of Charles D. Redwine, State Revenue Commissioner of Georgia, Plaintiff in Error, vs. Dan River Mills, Inc., Defendant in Error, docketed in said court as case Number 17225.

The Supreme Court of Georgia has appellate jurisdiction in such cases and is the highest court of the

State of Georgia in which a decision of that case could be had.

The decision of the Supreme Court of Georgia which petitioner here seeks to review is reported as *Redwine, State Revenue Commissioner v. Dan River Mills, Inc.*, 207 Ga. 381; 61 S. E. 2d 771.

PART I

SUMMARY OF MATTER INVOLVED

An income tax assessment for the year 1946 was made against the respondent, Dan River Mills, Inc., a Virginia corporation, for that portion of its income deemed to be attributable to the business activity of respondent carried on in the State of Georgia. Upon this assessment execution was issued and levied upon personal property of the corporation found within the State of Georgia. The respondent contested its liability for the entire tax assessed by pursuing the statutory remedy of the affidavit of illegality. (R. 5.) The petitioner's demurrer to this affidavit of illegality was overruled and exception taken to this interlocutory judgment. The case was thereafter tried to a jury and at the conclusion of the evidence, a verdict returned for the respondent, Dan River Mills, Inc., upon the preemptory instruction of the trial judge. A motion for new trial was made by the Revenue Commissioner and upon the refusal of a new trial, writ of error was filed in the Supreme Court of Georgia assigning error upon the overruling of the general demurrer to the affidavit of illegality, the summary direction of the verdict, and the denial of a new trial. (R. 1.)

On October 9, 1950, the Supreme Court of Georgia

affirmed the decision of the trial court and subsequently on November 14, 1950, denied the motion for rehearing.

The statutory formula for apportionment of income, to which the business activity of a non-resident of Georgia carried on within the State contributes, takes into account the three following major income producing elements of business:

(1) Capital as represented by the value of property employed in business,

(2) Labor, as represented by the amount of wages and salaries paid within the State, and

(3) Sales activity, as represented by the dollar value of goods sold.

The apportionment statute, codified as Section 92-3113, Georgia Code Annotated, is attached at page 11 as an appendix.

The pleadings and evidence disclosed that Dan River Mills, Inc., was chartered as a Virginia textile manufacturing company; that it maintained its principal office within the State of Virginia, and that its officers and directors were residents of the State of Virginia. In addition, respondent maintained in the City of Atlanta, Georgia, for the year in question a sales office equipped with furniture and other personal property and staffed by its salaried employees. It was the function and duty of the employees of the Atlanta office to solicit orders for textile goods. Orders so received were subject to acceptance at the home office of the company and when accepted, these orders were filled by delivery f.o.b. the company's mill in Virginia. In this manner the contract was made in the State of Virginia and title to and possession of all goods passed

in the State of Virginia. Georgia, however, contends that the sales activity of the Company by, through and from its Georgia office constituted an income producing factor and required the apportionment of certain of the company's income to Georgia for the purpose of taxation in accordance with the provisions of the statute. Respondent on the other hand by its affidavit of illegality in substance contends:

1. The activities of the corporation in Georgia did not constitute the doing of business within the meaning of the tax statute; it had no income attributable to "business done" in Georgia, and owes no tax;

2. The Revenue Commissioner included in the figure representing sales made by, from or through the corporation's Georgia office the value of goods sold on orders from buyers out of Georgia, submitted subject to home office acceptance and which were accepted by the company at its home office in Virginia, which orders were filled by shipment from the Virginia mill directly to the out-of-Georgia buyers. These contracts were made in Virginia upon acceptance there and title passed there upon shipment. This portion of the tax was, therefore, illegally assessed. (The corporation's activity with respect to these sales will be explained below.)

3. The nature of the corporation's activities carried on in Georgia and in connection with its Atlanta office (which will be described presently) were of such a nature that it may not be legally said that any sales were made "by, through or from" its Georgia office and, therefore, the corporation's tax liability, if any, should be determined

only by utilizing a two factor ratio, omitting the sales ratio.

4. Sales made by the corporation to buyers out of the State of Georgia may not properly and legally be included in the sales formula as sales made "by, through and from" its Georgia office merely because the offer to purchase came from a customer in territory canvassed or serviced by an employee working out of its Atlanta, Georgia, office or because the offer to purchase was taken by such employee and transmitted to it. To the extent that the value of sales made to purchasers outside of Georgia were included in the sales ratio, the assessment was erroneous and the fi. fa. is proceeding illegally.
5. The assessment of the taxes and the application of the apportionment formula as stated is a burden upon interstate commerce and, therefore, unconstitutional as in violation of Art. I, Sec. 8, Par 3 of the Federal Constitution (the commerce clause).
6. In including in the apportionment formula the dollar value of sales consummated outside the State of Georgia, the corporation is denied of due process of law in violation of Amendment XIV of the Federal Constitution and Art. I, Sec. 1, Par. 3 of the Constitution of Georgia.

The Supreme Court of Georgia in its opinion affirming the trial court's decision (R. 40.) stated that it was unnecessary to decide the constitutional questions raised by the affidavit of illegality and that its decision in *Suttles v. Owens-Illinois Glass Company*, 206 Ga. 849; 59 S. E. 2d 392, ruled the case adversely to the contentions of petitioner.

PART II

STATEMENT OF BASIS OF JURISDICTION

Petitioner states that this court has jurisdiction to review the decision complained of by reason of the jurisdiction and authority granted in Title 28 U.S. C.A., Sec. 1257 (3) as a final judgment of the highest court of this State in which a decision could be had where the validity of the State's statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Petitioner contends that the Supreme Court of Georgia did in fact decide that the statute of the State providing for the apportionment of income tax, codified as Section 92-3113, Ga. Code Annotated (Appendix, p. 11) did conflict with the Constitution of the United States and specifically with the due process clause of the Fourteenth Amendment, notwithstanding the fact that the Supreme Court of Georgia in its opinion stated that a decision of this and other constitutional questions was unnecessary.

PART III

THE QUESTIONS PRESENTED

The sole question presented is whether the State of Georgia has jurisdiction and authority to assess any tax upon the income of a non-resident corporation derived from the conduct of a unitary business beginning with the manufacture of goods and ending with sales under the following conditions:

1. When the non-resident corporation maintains a sales office in the State of Georgia with em-

ployees stationed at that office to whom it pays a salary.

2. When the corporation owns property in the State of Georgia consisting of office furniture, equipment and samples of its products.

3. When the employees of the Georgia office solicit sales from prospective customers within and without the State of Georgia.

4. When all orders upon which sales were made are submitted subject to acceptance at the home office outside the State of Georgia.

5. When all goods sold are sold f.o.b. the corporation's plant outside the State of Georgia, at which point title passes.

PART IV

REASONS RELIED UPON FOR SANCTIONING THIS PETITION.

Petitioner most respectfully contends that this Honorable Court ought to permit the filing of this petition and the sanction of same and review the judgment of the opinion complained of for the reason that the Supreme Court of Georgia did decide a federal question of substance not theretofore decided by this court, and that it has decided such question in a way probably not in accord with applicable decisions of this Court. Petitioner respectfully insists that the federal question so decided by the Supreme Court of Georgia was that the Fourteenth Amendment to the Federal Constitution denies to the State of Georgia jurisdiction to tax respondent on its income under the circumstances herein set out.

PART V

ASSIGNMENTS OF ERROR AND DESIGNATION OF NECESSARY PORTIONS OF THE RECORD

Error is assigned upon the making and entering of the judgment of the Supreme Court of Georgia, dated October 9, 1950, and upon the denial of motion for rehearing, dated November 14, 1950, in the case of Charles D. Redwine, Revenue Commissioner of the State of Georgia, Plaintiff in Error vs. Dan River Mills, Inc., Defendant in Error, docketed as case Number 17225 in the Supreme Court of Georgia, which decisions were based upon an opinion of said court rendered on October 9, 1950, upon which opinion error is likewise assigned. The following portions of the record in the case, duly certified to be correct by the Clerk of the Supreme Court of Georgia, over the seal of that court, are filed concurrently with the filing of this petition, to-wit:

1. The tax fi. fa. issued by Charles D. Redwine in his official capacity as State Revenue Commissioner of Georgia against Dan River Mills, Inc., for State income tax for the calendar year ending December 31, 1946, together with entry of levy thereof;
2. Affidavit of illegality filed February 9, 1949, by defendant in fi. fa. and returned to the Court below;
3. Amendment to affidavit of illegality filed May 17, 1949, together with order of the Court allowing same subject to demurrer and objections;
4. Demurrer of plaintiff in error to affidavit of illegality filed by defendant in error;
5. The order of the Judge overruling the demurrer

of plaintiff in error to affidavit of illegality of defendant in error, dated the 9th day of June, 1949;

6. The exceptions pendente lite filed by defendant in fi. fa. on June 21, 1949, to the ruling of the Court overruling the general demurrer of plaintiff in fi. fa. to the affidavit of illegality on behalf of defendant in fi. fa., together with the order and certificate of the court thereon, likewise dated June 21, 1949;
7. The verdict of the jury, dated December 12, 1949;
8. The judgment of the Court, entered December 12, 1949, upon the verdict of the jury;
9. The motion for new trial filed by plaintiff in error, December 16, 1949, together with the amendment thereof, filed May 19, 1950, and the orders of the Court certifying to the truth of facts recited in the said original motion and amendment thereto ordering the same filed and allowing additional time in which to file brief of evidence, and acknowledgement of service thereon;
10. The brief of evidence, together with certificate and order of the Court dated May 19, 1950, approving same and ordering it filed, which was filed May 19, 1950, and the acknowledgment of service thereon;
11. The judgment of the Court overruling motion for new trial upon each and every ground thereof, dated the 25th day of May, 1950.
12. Bill of Exceptions filed June 12, 1950;
13. Judgment and opinion of the Supreme Court of Georgia rendered October 9, 1950;
14. Motion for rehearing filed October 19, 1950;

15. Judgment denying motion for rehearing entered November 14, 1950.
16. Order of the Chief Justice of the Supreme Court of Georgia granting a stay of judgment, filed November 15, 1950.

Petitioner avers that the portion of the record cataloged above and transmitted constitute the entire record necessary to a clear understanding of the errors here complained of.

PART VI

PRAYER

WHEREFORE, petitioner prays that an order be now entered granting and sanctioning this petition for certiorari; let the certified transcript of proceeding of said Supreme Court of Georgia in the case entitled Charles D. Redwine, State Revenue Commissioner, Plaintiff in Error vs. Dan River Mills, Inc., Defendant in Error, Number 17225, transmitted herewith, be treated as though sent up in response to a formal writ; that said cause be reviewed and determined by this Court and that the petitioner have such other and further relief in the premises as this Honorable Court may deem appropriate.

P. O. Address:
201 State Capitol
Atlanta, Georgia

EUGENE COOK,
Attorney General
M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney General
LAMAR W. SIZEMORE,
Assistant Attorney General
MARTIN H. PEABODY,
Of Counsel

1015 William-Oliver Bldg.
Atlanta, Georgia

APPENDIX

GEORGIA CODE ANNOTATED 1933

92-3113. Corporations; allocation and apportionment of income.—The tax imposed by this law shall apply to the entire net income, as herein defined, received by every domestic corporation and every foreign corporation owning property or doing business in this State:

If the entire business income of the corporation is derived from property owned or business done in the State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on the portion of the business income reasonably apportioned to the property owned and business done within the State, to be determined as follows:

(1) Interest received on bonds held for investment is not subject to apportionment except as it may be used to reduce apportionable interest paid. Rentals received from real estate held purely for investment purposes and not used in the operation of the business are not subject to apportionment. All expenses connected with the interest and rentals realized from investments such as above are not subject to apportionment but must be applied against the investment income. The taxability of the net investment income depends upon the situs of the investment property or the situs of the corporation.

(2) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation nor for sale

in the regular course of business shall be allocated to the State if the property sold is real or tangible personal property situated in the State or intangible property not connected with the business in the State. Otherwise such gains shall be allocated outside the State.

(3) Net income of the above classes having been separately allocated and deducted, as above provided, the remainder of the net business income shall be apportioned as follows:

THREE FACTOR RATIO

(a) Tangible property ratio.—The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Georgia in connection with the trade or business done by such taxpayer in this State during the income year is to the total of such tangible property of the taxpayer owned and used in connection with the trade or business everywhere. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property at the beginning and the end of the taxable period based on cost. Cash on hand or in bank, shares of stock, notes, bonds, accounts receivable or other evidence of indebtedness, special privileges, franchises, patents, and good will; or property, the income from which is not taxable or is specifically allocated shall not be considered tangible property nor included in the apportionment.

(b) Salaries and wages ratio.—The percentage which the taxpayer's wages, salaries, commissions or other compensation paid or incurred in this State or paid in respect to labor performed in this State in connection with said trade or business done by such taxpayer in this State is to the taxpayer's total wages,

salaries, commissions paid or incurred in connection with said entire trade or business.

(c) Sales ratio.—The percentage which the sales made within this State and through, from or by offices, agencies, branches or stores within this State is to the total sales wherever made. For the purpose of this section, in determining the amount of sales made within Georgia, there shall be excluded therefrom, sales negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with or sent out from premises owned or rented outside the State by the taxpayer or by his agents or agencies for the transaction of business, and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises.

If the taxpayer maintains an office, warehouse or other place of business outside the State for the purpose of reducing its tax under this section it shall in determining the amount of taxable net income include therein the proceeds of sales attributed by the taxpayer to the business conducted at such place outside the State.

The tangible property ratio, the salaries and wages ratio, and the sales ratio are separately determined, the three percentages averaged, and the net income of the corporation allocated and apportioned to Georgia according to said average.

TWO FACTOR RATIO

(d) If only two of the foregoing ratios are applicable, the percentages of those two ratios which are applicable are averaged and the net income of the corporation allocated and apportioned to Georgia according to said average.

ONE FACTOR RATIO

(e) If only one of the foregoing three ratios is applicable, the net income of the corporation allocated and apportioned to Georgia shall be determined solely by that one ratio.

(4) Where income is derived principally from the holding and/or sale of intangible property, having a taxable situs in this State, the tax should be imposed on the entire business income; if a portion of such intangible property has a taxable situs without the State, the portion of the income derived from the holding and/or sale of such property attributable to this State shall be taken to be such percentage as the gross receipts from such intangible property in this State for the taxable year bear to the total gross receipts from such sources: Provided, that the taxable situs of intangible property held or owned by any domestic corporation or by any foreign corporation whose principal place of business is in Georgia, shall be deemed to be in the State of Georgia, notwithstanding any domicile of any such corporation established elsewhere.

(5) The net income of a domestic or foreign corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporation in excess of fair value, and by including fair compensation of such domestic business corporation for its commodities sold to or services performed for the parent corporation or affiliated corporation. For the purposes of determining such net income the Commissioner may equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof. (Acts 1937, pp. 109, 129; 1941, pp. 210, 215.)

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

STATEMENT OF THE FACTS AND CONTESTED ISSUES

We deem the statement of facts and questions presented as stated in Parts I and III of the foregoing petition sufficient for this brief without repetition or elaboration. In additional to the single substantial question which has been stated as Part III of the petition for certiorari, petitioner has the burden of demonstrating that the Supreme Court of Georgia did in fact decide a constitutional question notwithstanding the fact that in its opinion it stated that decision of none of the constitutional questions was necessary.

III.

a. The Supreme Court of Georgia did in fact decide a federal constitutional question of substance.

In its opinion rendered on November 9 (R. 40) in this case the Supreme Court of Georgia stated:

> "This court as recently as May 8, 1950, decided *Suttles v. Owens-Illinois Glass* Co., 206 Ga. 849, 59 S. E. 2d, 392. The question then under consideration was the right of the State of Georgia to tax accounts receivable under a state of facts almost identical with the facts in the instant case. . . . We know of no reason, and none has been pointed out, why the principles of law as laid down in the *Suttles* case supra, should not be applied to the collection of income taxes under the state facts disclosed by the case now under

consideration. We therefore hold that the rules of law applied in the Suttles case, supra, must be applied in the instant case. . . ."

In *Sutties v. Owens-Illinois Glass Co.*, supra, the Supreme Court of Georgia was not concerned with an income tax statute but with the constitutional propriety of an ad valorem property tax upon accounts receivable and of the situs of these accounts for purpose of taxation. Petitioner pointed out in the motion for rehearing (R. 44.) that the taxpayer in that case by its pleadings made a constitutional question of due process under the Fourteenth Amendment to the Constitution of the United States and how this constitutional position was relied upon in the Supreme Court of Georgia. Petitioner insists that the Supreme Court of Georgia in its decision in *Suttles v. Owens-Illinois Glass Co.*, supra, decided this constitutional issue of due process as the language of the opinion makes abundantly clear. In making its decision in the instant case turn upon what was decided in the *Suttles* case the Supreme Court of Georgia has necessarily decided the same constitutional question there found to be controlling and which was appropriately raised and in issue in the instant case.

This Court in *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, considered the question of taxable situs of accounts receivable as one requiring a construction of the Fourteenth Amendment. The Supreme Court of Georgia recognized that the same issue passed upon in the *Wheeling Steel Corporation* case was also presented in the *Suttles* case, the Chief Justice saying in his opinion:

"It was held in *Wheeling Steel Corporation v. Fox*, supra, that to tax intangibles contrary to

the tax situs rule stated above would constitute a denial of due process and would offend the Fourteenth Amendment."

Since the decision in the instant case is made to turn upon what was decided in *Suttles v. Owens-Illinois Glass Co.*, Supra, which in turn was based upon the decision of this Court in *Wheeling Steel Corporation v. Fox*, then the conclusion seems inescapable that the Supreme Court of Georgia has in fact decided the same substantial federal question decided by this Court in the *Wheeling Steel Corporation* case.

b. Due process does not limit the right of the state to impose an apportioned income tax upon a non-resident corporation to those situations where its business activities serve to establish a taxable situs for its accounts receivable.

In the taxation of intangibles that species of property must be assigned an exclusive taxable situs. In dealing with an apportioned income tax the danger of double taxation is not present and controlling in the same manner. That the right of a state to impose an income tax upon non-residents depends upon a different kind of jurisdictional fact has been clearly recognized since *Shaffer v. Carter*, 252 U. S. 37, and *Travis v. Yale & Towne Manufacturing Company*, 252 U. S. 60. Also see *International Harvester v. Wisconsin Dept. of Taxation*, 322 U. S. 435.

Here the respondent owned property within the State of Georgia and that State therefore had jurisdiction and authority to impose some tax under this Court's decision in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80. It paid wages and salaries to its employees within Georgia and consequently had the right

to tax under the doctrine of *International Shoe Company v. State of Washington*, 326 U. S. 310. Its maintenance of an office and place of business in Georgia conferred jurisdiction to impose some income tax upon the authority of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62; *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson v. Montgomery Ward*, 312 U. S. 373; and *General Trading Company v. State Tax Commission*, 322 U. S. 335. The continuous solicitation of business likewise constituted a sufficient jurisdictional fact for purpose of state income taxation. *International Shoe Co. v. State of Washington*, 326 U. S. 310; *Nippert v. City of Richmond*, 327 U. S. 416; *Tanza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915.

c. The judgment of the Supreme Court of Georgia is not based upon an independent and adequate non-federal ground.

The affidavit of illegality (R. 5, 12.) reflects that a federal constitutional question of substance was presented; and the decision of the court, even if based upon a non-federal ground, is not adequate independently to support the judgment without consideration of the federal question. *Enterprise Irrigation District v. Farmers' Mutual Canal Company*, 254 U. S. 157, 164.

It has been well settled since *Klinger v. Missouri*, 13 Wall. 257, that if an independent non-federal ground was not a substantial and sufficient one, "it will be presumed that the State court based its judgment on the law raising the federal question, and this court will then take jurisdiction." *Klinger v. Missouri, supra*, at page 263. Also *see Williams v. Kaiser*, 323 U. S. 471, 478; *Maguire v. Taylor*, 8 Wall. 650, 655; *Johnson v. Risk*, 137 U. S. 300, 307; *Lawrence v. State Tax Commission*, 286 U. S. 276, 282-3.

As stated by this court in *Lawrence v. State Tax Commission*, supra, at page 282, "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the State court rests upon a fair or substantial basis."

The non-federal ground must be tenable, and review by this court cannot be evaded by any non-federal ground so unfounded "that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, supra, 164; and see *Ward v. Board of County Com'rs*, 253 U. S. 17, 22; *Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 475-6; *Lawrence v. State Tax Commission*, supra, 282.

III.

CONCLUSION

In the light of the foregoing petitioner respectfully urges that Certiorari be granted in order that the errors complained of may be considered and corrected.

Respectfully submitted,

201 State Capitol
Atlanta, Georgia

EUGENE COOK
Attorney General of Georgia

M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney General of Georgia

LAMAR W. SIZEMORE
Assistant Attorney General of Georgia

1015 William-Oliver Building
Atlanta, Georgia

MARTIN H. PEABODY
Of Counsel
Counsel for Petitioner.

MAR 14 1951

IN THE

Supreme Court of The United States

OCTOBER TERM, 1950

No. 582

CHARLES D. REDWINE,
Commissioner of Revenue of the State of Georgia,
Petitioner

vs.

DAN RIVER MILLS, Incorporated,
Respondent

PETITION FOR CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK TALBOTT, JR.
WILLIAM K. MEADOW
ROBERT B. TROUTMAN
Attorneys for Respondent

SPALDING, SIBLEY, TROUTMAN & KELLEY
434 Trust Company of Georgia Building
Atlanta, Georgia,
Of Counsel for Respondent

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATUTE INVOLVED	2
STATEMENT	2
ARGUMENT	2
CONCLUSION	5
APPENDIX	6

LIST OF AUTHORITIES CITED

Page

CASES:

Cuyahoga River Power Co. vs. Northern Realty Co., 244 U.S. 300 5

Doyle vs. Atwell, 261 U.S. 590 5

Fox Film Corp. vs. Muller, 296 U.S. 207 4

Lynch vs. Pierson, 293 U.S. 52, 54-55 5

Minnesota vs. National Tea Co., 309 U.S. 551 4

Musser vs. Utah, 333 U.S. 95 4

Radio Station WOW, Inc., vs. Johnson, 326 U.S. 120 . . 4

Redwine, Commissioner, vs. Dan River Mills, Inc., 207 Ga. 381; 61 S.E. (2d) 771 1

Snell vs. Chicago, 152 U.S. 191 5

Suttles vs. Owens-Illinois Glass Co., 204 Ga. 849; 50 S.E. (2d) 392 3

Thompson vs. Consolidated Gas Co., 300 U.S. 55 . . . 4

Wheeling Steel Corp. vs. Fox, 298 U.S. 193 3

Young vs. Ragan, 337 U.S. 235 4

STATUTES CITED:

28 U.S.C.A., Sec. 1257 (3) 1

Georgia Code of 1933,

Secs. 92-3001, et seq. 2

Secs. 92-3102, 92-3113 (App.) 6

IN THE

Supreme Court of The United States

OCTOBER TERM, 1950

No.....

CHARLES D. REDWINE,
Commissioner of Revenue of the State of Georgia,
Petitioner

vs.

DAN RIVER MILLS, Incorporated,
Respondent

PETITION FOR CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Georgia (R. 40-44) is reported in 207 Ga. 381; 61 S.E. (2d) 771.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered October 9, 1950 (R. 44), and petitioner's motion for rehearing was denied November 15, 1950 (R. 49). The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257 (3).

QUESTION PRESENTED

Petitioner states that the question is whether the State of Georgia has jurisdiction and authority to assess any tax upon the

income of respondent. (Petition p. 6.) Respondent does not agree with this statement. The question is not whether the State has authority to assess a tax, but whether the State has in fact attempted to do so. The Supreme Court of Georgia held that the State statute, properly construed, did not impose any tax on respondent under the circumstances of this case. The court expressly said that this rendered unnecessary the consideration of any constitutional question.

STATUTE INVOLVED

The statute involved is the Income Tax Act of 1931, as amended. It is codified in the 1933 Code of Georgia at sections 92-3001, et seq. The parts of the statute to be considered are set out in the appendix, infra, page 6.

STATEMENT

On page 4 of the petition, petitioner states the contentions of the parties in the court below. As stated by petitioner, the first contention of respondent was that its activities "did not constitute 'doing business' within the meaning of the tax statute." The Supreme Court of Georgia sustained this contention and expressly stated that this rendered unnecessary the consideration of any other questions. Therefore, it is unnecessary to consider whether other contentions are correctly stated, as they were rendered immaterial by the decision of the Georgia court on the first contention of respondent.

ARGUMENT

The Supreme Court of Georgia did not consider any constitutional questions, but held that the Georgia income tax statute, properly construed, did not impose any tax on respondent under the circumstances of this case. The court, therefore, said at the conclusion of its decision:

> "It becomes unnecessary, therefore, to decide the constitutional questions raised by the affidavit of illegality." (R. 44.)

The court also, in its opinion, stated fully the activities of respondent which were necessary to be considered in determining whether it was "doing business" in Georgia within the meaning of the statute. After stating these facts, the court then commented:

> "Certain constitutional questions were raised, not necessary here to be stated." (R. 43.)

Petitioner contends that because the Supreme Court referred to *Suttles vs. Owens-Illinois Glass Co.*, 206 Ga. 849; 59 S.E. (2d) 392, as authority for its ruling, it necessarily decided a constitutional question, despite its express statement to the contrary. This contention is unsound.

The *Suttles* case involved the ad valorem taxation of accounts receivable owned by a non-resident. In that case the court held that intangibles owned by a non-resident are not taxable ad valorem under the Georgia law unless they have acquired a "taxable situs" in Georgia, and that whether they have such situs depends on whether the accounts accrue out of or are incident to business done by the non-resident in this State. In the *Suttles* case the Supreme Court held that the Glass Company was not "doing business" in Georgia under the rule stated and, therefore, the accounts receivable were not subject to tax under the Georgia law. It cited a large number of cases dealing with the question of "doing business" and "taxable situs" and then said that the federal courts and the courts of other states had applied the same rule, and in support of this statement cited the decisions of several state courts and the decision of this Court in the case of *Wheeling Steel Corporation vs. Fox*, 298 U.S. 193.

The Georgia income tax statute does not impose a tax on a non-resident corporation unless it is "doing business" in Georgia. The statute does not define "doing business." This meaning of these words as used in the statute must be determined by the law as settled by decisions of the courts of Georgia. Many of

these decisions[1] were considered and cited in the *Suttles* case, and in the present case the court saw no necessity of citing them again. Most, if not all, of these cases were decided prior to the enactment of the Georgia statute and the legislature is presumed to intend to use these words in accordance with their settled meaning as determined by the Georgia courts.

The Supreme Court held in the *Suttles* case that a corporation situated similarly to respondent was not "doing business" within the meaning of the Georgia law, and therefore, the *Suttles* case was controlling authority that the Georgia statute does not attempt to tax respondent.

The determination of what constitutes "doing business" under the Georgia statute and the extent, if any, to which it has attempted to tax respondent involve only the construction of a state law, and no federal question is presented.

The Georgia court has decided no federal question, but has merely construed a state statute. This Court, therefore, will not review the decision.

Young vs. Ragan, 337 U.S. 235

Musser vs. Utah, 333 U.S. 95

Radio Station WOW, Inc., vs. Johnson, 326 U.S. 120

Minnesota vs. National Tea Co., 309 U.S. 551

Thompson vs. Consolidated Gas Co., 300 U.S. 55

Fox Film Corp. vs. Muller, 296 U.S. 207

---

[1] *Armour Packing Co. vs. Savannah*, 115 Ga. 140; *Armour Packing Co. vs. Augusta*, 118 Ga. 552; *Armour Packing Co. vs. Clark*, 124 Ga. 369; *Columbus Mutual Life Ins. Co. vs. Gullatt*, 189 Ga. 747; *Suttles vs. Associated Mortgage Companies*, 193 Ga. 78; *National Mortgage Corp. vs. Suttles*, 194 Ga. 768; *Davis vs. Metropolitan Life Ins. Co.*, 196 Ga. 304; *Davis vs. Penn Mutual Life Ins. Co.*, 198 Ga. 550; *Northwestern Mutual Life Ins. Co. vs. Suttles*, 201 Ga. 84; *Davis vs. Penn Mutual Life Ins. Co.*, 201 Ga. 821; *Montag vs. State Revenue Commission*, 50 Ga. App. 660, 182 Ga. 568; *Vicksburg vs. DeBow*, 148 Ga. 738; *Southeastern Distributing Co. vs. Nordyke*, 159 Ga. 150; *Dennison Mfg. Co. vs. Wright*, 156 Ga. 789.

Lynch vs. Pierson, 293 U.S. 52, 54-55

Doyle vs. Atwell, 261 U.S. 590

Cuyahoga River Power Co. vs. Northern Realty Co., 244 U.S. 300

Snell vs. Chicago, 152 U.S. 191

CONCLUSION

No federal question is presented and the petition for certiorari should be denied.

Respectfully submitted,

FRANK TALBOTT, JR.
WILLIAM K. MEADOW
ROBERT B. TROUTMAN
Attorneys for Respondent

SPALDING, SIBLEY, TROUTMAN & KELLEY
434 Trust Company of Georgia Building
Atlanta, Georgia,
Of Counsel for Respondent

"Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent. of the net *income from property owned* or from *business done in Georgia* as is defined in Section 92-3113: * * *" (*Italics supplied.*)

Georgia Code 1933, Sec. 92-3102

"The tax imposed by this law shall apply to the entire net income, as herein defined, received by every domestic corporation and every foreign corporation owning property or *doing business* in this State:

"If the entire business income of the corporation is derived from property owned or business done in the State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on the portion of the business income reasonably apportioned to the property owned and *business done within the State* to be determined as follows: * * * " (*Italics supplied.*)

Georgia Code 1933, Sec. 92-3113